

# Exhibit E

**U.S. District Court  
Southern District of Florida (West Palm Beach)  
CIVIL DOCKET FOR CASE #: 9:12-cv-81120-WPD**

ADT LLC v. Security Networks, LLC et al  
Assigned to: Judge William P. Dimitrouleas  
Referred to: Magistrate Judge William Matthewman  
Case in other court: USCA, 16-15351-D  
USCA, 19-10525-A  
Cause: 15:1125 Trademark Infringement (Lanham Act)

Date Filed: 10/12/2012  
Date Terminated: 06/21/2019  
Jury Demand: Defendant  
Nature of Suit: 840 Trademark  
Jurisdiction: Federal Question

02/27/2017	<a href="#"><u>267</u></a>	MOTION in Limine to <i>Exclude ADT's Customer Evidence at Trial</i> by NorthStar Alarm Services LLC. (Attachments: # <a href="#"><u>1</u></a> Exhibit A)(Chait, Matthew) (Entered: 02/27/2017)
03/01/2017	<a href="#"><u>276</u></a>	RESPONSE in Opposition re <a href="#"><u>267</u></a> MOTION in Limine to <i>Exclude ADT's Customer Evidence at Trial</i> filed by ADT LLC. Replies due by 3/8/2017. (McNew, Charles) (Entered: 03/01/2017)
03/02/2017	279	ORDER denying <a href="#"><u>267</u></a> without prejudice to renew NorthStar's Motion in Limine to exclude evidence of ADT's customer complaints for the reasons stated on the record during the motion hearing. Signed by Magistrate Judge James M. Hopkins on 3/2/2017. (hky) (Entered: 03/02/2017)
03/02/2017	281	PAPERLESS Minute Entry for proceedings held before Magistrate Judge James M. Hopkins: Miscellaneous Hearing on parties' motions in limine (DE 261, 262, 267) held on 3/2/2017, and Final Pretrial Conference held on 3/2/2017. Total time in court: 1 hour(s) : 34 minutes. (Digital 9:31:20) (hky) (Entered: 03/02/2017)

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE SOUTHERN DISTRICT OF FLORIDA  
3 CASE NO. 9:12-cv-81120-DTKH  
4

5 ADT LLC,

6 Plaintiff,

7 vs.

8 SECURITY NETWORKS, LLC.,  
9 et al.,

10 Defendants.

March 2, 2017

9:31 a.m.

West Palm Beach, Florida

Pages 1 through 67

11  
12  
13 TRANSCRIPT OF MISCELLANEOUS HEARING  
14 ON PARTIES' MOTIONS IN LIMINE  
15 BEFORE THE HONORABLE JAMES M. HOPKINS  
16 UNITED STATES MAGISTRATE JUDGE

17 APPEARANCES:

18 For the Plaintiff:

Charles Sanders McNew, Esq.  
Richard G. Sander, Esq.

19 For the Respondent  
20 NorthStar Alarm Services:

Matthew Ross Chait, Esq.  
Eric Christu, Esq.  
Jonathan Phillip Hart, Esq.

21  
22  
23  
24 Transcribed By:

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25

1 right to take the deposition of Mr. Christenson, the fact  
2 witness that they identified in their witness disclosures, as  
3 well.

4 MR. CHAIT: We have never denied that and when they  
5 asked, we said yes.

6 THE COURT: Okay.

7 MR. CHAIT: No motion required, Judge.

8 THE COURT: The next one I want to address is  
9 NorthStar's motion in limine to exclude ADT's evidence of  
10 customer complaints where the out-of-court declarant was not  
11 deposed and the related spreadsheet summaries prepared by ADT.  
12 I'm inclined to agree with ADT on this point.

13 As has been pointed out, I have found that the  
14 recordings are reliable, and it seems to me at this stage of  
15 the proceeding it is necessary for ADT to use that information  
16 to attempt to quantify the extent of the damages. Now,  
17 whether they can do it is another matter.

18 And that's something I want to talk a little bit  
19 about is how you're going to go about doing that, in an effort  
20 to figure out how long this hearing is going to last.

21 But before we get into that, do you want any final  
22 word to persuade me of this ruling, other than repeating what  
23 you've already said?

24 MR. CHAIT: I would like to try, your Honor.

25 THE COURT: Go ahead.



1 MR. CHAIT: Because I think there are some things  
2 that haven't been said.

3 So what we're really talking about is whether these  
4 recordings fit within the residual rule, and we've obviously  
5 had extensive hearings on that.

6 One of the elements of the residual rule is that they  
7 have to be -- the evidence has to be evidence of a material  
8 fact. We've already dealt with the Court's correct statement  
9 that their argument about law of the case that they asserted  
10 in their response last night is not relevant here.

11 THE COURT: I noted it in the notes, too.

12 MR. CHAIT: So, I think there are two issues that we  
13 have to focus on. I would like to start with evidence of a  
14 material fact because I don't think enough has been said about  
15 that.

16 ADT has said in its various filings, Mr. McNew has  
17 said it again this morning, they're seeking only compensatory  
18 damages. The Court has recommended 16 violations of the  
19 injunction. Their compensatory damages will have to be  
20 necessarily damages that directly flow from those 16  
21 violations.

22 Calls with other customers -- because that's what  
23 we're really talking about here -- calls with other customers  
24 are not probative of that. This is a contempt proceeding and  
25 they are limited, as they have acknowledged, to damages for

1 their proven violations which, right now, is 16. And that is  
2 the most it will be.

3 What they are asking --

4 THE COURT: I don't think that I agreed with that. I  
5 mean, it seems to me that we have 16 violations. That I  
6 found, anyway. And I think that they can make the argument --  
7 and I think it will be relevant to this argument -- but I  
8 think they can make the argument that the 16 violations  
9 evidence a pattern or scheme that is not limited to the 16  
10 violations.

11 MR. CHAIT: Your Honor, I respectfully disagree.  
12 They cannot make that argument in contempt. If they had sued  
13 us under the Lanham Act, which we've repeatedly said was their  
14 choice not to do, then maybe. But in contempt, there is no  
15 case that supports that damages model in the contempt case.  
16 They cannot do that.

17 And the Court has already necessarily found that a  
18 call does not equal a violation by virtue of the fact that  
19 they presented to you 19 and the Court found 16. So those are  
20 three calls right there that the Court said those witnesses,  
21 there was no contempt.

22 Now, not only that. Of the 261 -- and they have a  
23 different number, but close to 261 -- about 134 of them  
24 concern the so-called upgrade violations. And the Court found  
25 no upgrade violations even on their 16 or their 19.

1           So even if a scheme were relevant, which, again,  
2 there is no case that supports that damages model in  
3 contempt -- and they're not going to show you one -- the calls  
4 of other customers are not probative of a material fact  
5 because just because there is a call doesn't mean there is a  
6 violation.

7           Now, they cite these cases --

8           THE COURT: Let me go, give them an opportunity on  
9 that point.

10          MR. CHAIT: Sure, sure.

11          MR. McNew: Judge, there are plenty of cases that  
12 talk about how you measure damages under the act -- I mean, in  
13 a contempt proceeding. And there are Eleventh Circuit cases  
14 that say where the violation is an injunction that arose under  
15 the trademark law, the trademark measure of damages is an  
16 appropriate measure.

17           If what they were saying were correct, then a guy  
18 selling knockoff Fendi bags could only receive, in violation  
19 of an injunction, would only be able to receive 100 bucks for  
20 the violation because they might only be able to prove one  
21 sale.

22          THE COURT: Where are the cases that you're talking  
23 about?

24          MR. McNew: I would have to, again -- we've already  
25 offered them in the motion, but I would be happy to provide

1 you with additional authorities.

2 THE COURT: Okay.

3 MR. CHAIT: If I may, your Honor?

4 THE COURT: Um-h'm.

5 MR. CHAIT: First of all, the trademark cases are  
6 trademark cases.

7 THE COURT: I understand that.

8 MR. CHAIT: This is not that.

9 The cases that ADT cites, particularly on page 5,  
10 there is a series -- a long paragraph on page 5 of their  
11 response. I would like to make a couple general statements  
12 about those cases. And, obviously, we haven't had a lot of  
13 time to really get through all of them.

14 First of all, not a single one of those is a contempt  
15 case, which is about the most relevant thing I could say about  
16 them. None of them allowed inadmissible evidence to prove  
17 damages.

18 What those cases are all talking about, on page 5 of  
19 their response, those are all instances of defendants whose  
20 conduct made the proof of damages difficult or impossible, and  
21 so the courts allowed less reliable evidence in to prove  
22 damages because it was the defendant's very conduct that made  
23 it impossible to prove.

24 That's not present here. They haven't alleged that.

25 The Louis Vuitton case that they cite, *Louis Vuitton*

1 v *Spencer Handbags*, 765 F.2d 966, that's a Second Circuit  
2 case, they cite for the proposition that the Second Circuit  
3 approved a damages award based on a hearsay recording of  
4 defendant's remarks regarding the volume of sales.

5 Well, their statement about the case is its own  
6 undoing. The videotaped statements were the defendant's  
7 statements. They were admissions. That is also not what  
8 we're talking about here.

9 So those statements on the videotape came in as  
10 admission. They were not hearsay. What we're talking about  
11 here are recordings of calls with customers that were not  
12 under oath, that are not NorthStar, are not alleged to be  
13 NorthStar.

14 And, so, while admittedly the Court had suggested or  
15 I think said outright at one of the prior hearings that you  
16 felt that the trustworthiness element had been met, the Court  
17 also did make extensive findings about the fact that these  
18 calls were not necessarily reliable.

19 They've been distinguished from the FTC cases that  
20 ADT has cited, such as *Figgie*, and have amounted to what the  
21 Court called a unilateral run at the witness.

22 So, here, where the Court has already made a  
23 determination that a call does not necessarily equal a  
24 violation, and where in this contempt case -- and they're not  
25 citing you any cases that suggest otherwise because there

1 aren't any -- but where in a contempt case they are limited to  
2 their losses for the 16 violations that the Court found, I  
3 fail to see the relevance, what material fact these calls go  
4 to.

5 THE COURT: First issue, first. And let's allow them  
6 an opportunity to brief it again, and you, of course, to  
7 respond to it. And similar to the other issue. If I find  
8 that I want to call you back in, we'll come back in.

9 MR. McNew: Judge, I would just point out that the  
10 *Howard Johnson v Khimani* decision, 892 F.2d, 1512, it's an  
11 Eleventh Circuit decision from 1990, at page 1519, makes it  
12 clear that when a Court is levying sanctions for violation of  
13 an injunction arising under the Lanham Act, it can look to the  
14 Lanham Act's case law as guidance for the amount of damages to  
15 be assessed. And the Court there had no problems with  
16 estimating a damages amount based on its understanding of the  
17 facts. It did not require direct proof to get to where the  
18 plaintiff was trying to go. That's at page 1519.

19 So it's simply not true that this doesn't arise in  
20 contempt cases.

21 With respect to their effort to distinguish the case  
22 law saying that proof of damages is relaxed, that is a basic  
23 rule of tort law. Again, basic law of remedies. It goes back  
24 a century.

25 They say that they did not make it impossible for us

1 to figure out our damages. Completely false. You know, they  
2 aren't -- we have no way of tracking what their sales agents  
3 are doing in the field. That is information uniquely within  
4 their -- within their knowledge. And we are left to figure  
5 out, from the outside in, what the damages are.

6 We fall squarely within the four corners of that very  
7 rich vein of cases.

8 MR. CHAIT: Your Honor, since we're doing further  
9 briefing, we'll address it. *Howard Johnson*, though, does not  
10 stand for the proposition that in a contempt case the Court  
11 can allow in evidence of unproven violations. And that's  
12 what's at issue here. That's all we're talking about.

13 These calls are, at best, evidence of violations  
14 never proven. But they have all of these other issues that  
15 the Court has already found. The lack of reliability, the  
16 fact that they were not under oath, the fact that we were not  
17 present.

18 *Howard Johnson* and no other case stand for the  
19 proposition that you can allow in evidence in a contempt  
20 proceeding of unrelated violations. We're in the damages  
21 phase now. The Court has found 16 violations, and, at best,  
22 they can seek damages for those 16 violations.

23 If it's a scheme they want, then contempt is not the  
24 right framework.

25 THE COURT: I'm going to take a close look at it.

1 The *Johnson* -- I just read it myself, you know, the pertinent  
2 part. I'm certainly intrigued enough by the arguments to give  
3 it a close look. I'll give you an opportunity to make your  
4 arguments in writing and then to respond in writing.

5 Like I said, there is no reason to rush to judgment  
6 on it. We're going to be taking a look at a couple of issues  
7 anyway. And, likely as not -- because how I rule on this  
8 issue is going to impact the length of the proceeding -- we're  
9 going to have to get back together to discuss if not the  
10 issues that are raised in the two things you're going to  
11 brief, but perhaps the implications for the length of the  
12 hearing.

13 And I would hope that you all would communicate  
14 better about how you plan to conduct the hearing so that we  
15 don't waste time at the hearing. And probably I'm going to  
16 want to talk with all of you about that. So it's most likely  
17 that I'm going to call you back in after getting your further  
18 pleadings and you can hone in on the length of the hearing a  
19 little more closely and how you plan to conduct the hearing.

20 But let's set a hearing date now.

21 MR. McNew: March 15?

22 MR. CHAIT: We're not available.

23 2018, I'm available.

24 THE COURT: Maybe we should also set some deadlines  
25 just for those briefs. How long do you want to do your



1 So I can commit that those dates work for us. No one needs to  
2 check with me on that.

3 THE COURT: Okay. Anything else for today?

4 Okay.

5 MR. CHAIT: Could I ask just a quick question? This  
6 is something we had talked about, but it's a little premature.  
7 Mr. Sander and I had discussed electronic presentation at  
8 trial, and we had agreed that it probably made sense to ask  
9 your Honor if your Honor has a preference about that. To be  
10 using the monitors and all that, just to see the exhibits,  
11 versus hard copies.

12 THE COURT: Oh, I'm --

13 MR. CHAIT: I'm sorry?

14 THE COURT: I'm a big electronic fan, so ...

15 MR. CHAIT: Great. As are we.

16 THE COURT: Okay. Thanks.

17 MR. CHAIT: Thank you, your Honor.

18 MR. McNew: Thank you, your Honor.

19 (Court recessed at 10:39 a.m., and proceedings continued  
20 as follows at 11:10 a.m.):

21 THE COURT: We're back on line?

22 COURTROOM DEPUTY: Yes.

23 THE COURT: Okay.

24 Recalling ADT versus Security Networks, et al.

25 Counsel, please announce your appearances, again.

1 MR. McNew: Sanders McNew and Chip Sander for the  
2 plaintiff, ADT.

3 MR. CHAIT: Matthew Chait, with Eric Christu and  
4 Jonathan Hart for NorthStar.

5 MR. O'BRYAN: John O'Bryan for Vision Security.

6 THE COURT: Thank you all for quickly reconvening.

7 In the interim, I did some more thinking and taking a  
8 look at *Howard Johnson's* in more better detail and thinking  
9 about all the implications of this.

10 And what started me on the thinking journey was the  
11 thought that if the defense is correct, does that mean -- that  
12 is, correct on the issue of being limited to the 16 violations  
13 that I've identified -- does that mean that I was incorrect in  
14 my prior ruling?

15 And, so -- but before I wanted to go down that path  
16 too much, I wanted to get you all back here -- and thanks for  
17 coming back so quickly. And I wanted to take a look at *Howard*  
18 *Johnson's* to see what *Howard Johnson's* means. And, so, I'm  
19 taking a look at *Howard Johnson's*, and at the end of 1519, it  
20 seems to me, is the really pertinent part of *Howard Johnson's*.

21 That's at Headnote 10, which says, "the District  
22 Court determined Howard Johnson's actual damages by  
23 calculating the amount of royalty payments it would have  
24 received during the period that the defendants were diluting  
25 or using a colorable imitation of its trademark had defendants

1 been a genuine Howard Johnson's franchise."

2 And in the context of this case, it seems to me that  
3 applying that logic to this case, we would be talking about  
4 damages during the period that are shown by the 16 violations.  
5 And it really doesn't probably make much difference if we go  
6 beyond the 16 violations during that period, because we've  
7 already established -- or we've already concluded that there  
8 were 16 violations during that period so that the defense was  
9 in violation during that period. And we're talking about a  
10 relatively discrete period.

11 So it seems to me that -- and, furthermore, the 263  
12 or whatever the number is of calls that you have doesn't do  
13 much to advance your measure of damages. I mean, really, what  
14 are your measure of damages for that period of time? Not --  
15 do you think you're -- that you're limited to the 16?

16 MR. McNew: No, sir.

17 THE COURT: I didn't think so. So what -- what  
18 relevance does the 263 give you?

19 MR. McNew: Well, your Honor, I -- in terms of the  
20 relevance of the testimony --

21 THE COURT: Can you talk into the mike a little --

22 MR. McNew: Sure. I'm sorry.

23 With respect to the relevance of the testimony --  
24 relevance of the calls, they support the damages analysis that  
25 the experts will offer, which will look at the known instances

1 of disrupted or loss accounts. And then we'll try to  
2 extrapolate from that a number of probable loss over the  
3 period.

4 More broadly --

5 THE COURT: So, what does that mean? So you're going  
6 to say what?

7 MR. McNew: Well, we're going to have an expert who  
8 will opine that for every instance that we are aware of, there  
9 were likely a multiplier of instances that we're not aware,  
10 and that the data that he's relying on are the call data.

11 I mean, he's going to be looking at who called --  
12 which of those people left ADT and signed contracts with  
13 NorthStar. Which ones signed NorthStar contracts and later  
14 came back to ADT. And then we'll have another expert who will  
15 assign values, dollar values to those.

16 But beyond that syllogism or equation of loss and  
17 disrupted customers over the period, there is also the issue  
18 of a loss to ADT's control of its mark, ADT's loss to goodwill  
19 and reputation. And all of the calls would be relevant to  
20 that to establish pervasiveness of the conduct and how that  
21 has eroded ADT's goodwill and ability to control its  
22 trademark.

23 Now, if you're asking -- I guess that answers your  
24 question, so I'll stop there. If you have other questions,  
25 I'll be happy to answer them.

1 One thing I would add, if your Honor will hear it?

2 THE COURT: Go ahead.

3 MR. McNew: One thing I would add is that I think  
4 that this process, this kind of iterative process of, you  
5 know, were they bound? did they violate? and, now, how big is  
6 the violation? has been useful in some ways. But I think one  
7 way that it has done an injustice to the process is that it  
8 has led us all to balkanize what should have been, had we had  
9 woken up in time, a singular proceeding.

10 I mean, typically you don't consider liability in a  
11 divorce from damage. And that's an issue we're going to be  
12 facing soon in the APT case, as you're well aware of.

13 And, so, to my mind, it is a false construct to say  
14 okay, the damages phase -- I mean the liability phase is  
15 closed, you've proven 16 violations, what is the loss of those  
16 16 violations?

17 What we had understood your Honor to be doing -- and  
18 we had a colloquy about this at the December 12th hearing.  
19 What I had understood your Honor to be doing was to basically  
20 be establishing a threshold and saying okay, so we're going to  
21 have this -- you're going to give me your evidence on December  
22 16th, and I'm going to consider it. And if I find violations,  
23 then we'll move forward.

24 I don't think that the Court ever intended that to be  
25 a final ruling on the full extent of the violations of the

1 injunction.

2 And so now to say, ah-ha, you've only proven 16, so  
3 that's what your universe of damages are, is contrary to what  
4 the Court ruled on December 12, which was I will determine the  
5 extent of the violations in the context of damages.

6 So I object to this kind of, you know, siloed  
7 analysis whereas this silo and this silo, and what we're doing  
8 now is divorced from what was already done, because that's not  
9 the way this was meant to proceed.

10 I mean, this is -- the Court sits in equity. If, at  
11 the end of the day, they were to prevail on an argument that  
12 we're cabined to now 16 claims for our damages when we were  
13 barred from offering proof of a much larger universe, that  
14 would be unfair.

15 THE COURT: Well, my inclination is that upon  
16 re-examination of it, I agree.

17 It seems to me that what the 16 violations did was  
18 what I anticipated they would do. Shows a -- an organized  
19 effort to violate the terms of the injunction over the period  
20 of time in question.

21 And it shows that it's not just limited to the 16.  
22 Rather, NorthStar was violating over the period. Not limited  
23 to those 16. Not necessarily limited to 263. Because  
24 undoubtedly there were people that were improperly approached  
25 who didn't complain to ADT.

1           Now, I don't know how you're going to calculate your  
2 damages, but I wouldn't presuppose to decide in advance how  
3 many were -- you know, what's the measure of your damages and  
4 how you're going to figure that out.

5           Rather, I would just say on the issue at hand, after  
6 taking a look at *Howard Johnson's* and applying it to this  
7 case, I don't think that we're limited to the 16. Rather, I  
8 think we're limited to damages that occurred as a result of  
9 the defendant's conduct during the period of time that the 16  
10 violations show there was an organized, widespread violation  
11 of the injunction.

12           I'll leave it to your creative minds to figure out  
13 what a proper measure of it is.

14           MR. McNew: That certainly accords with our  
15 understanding of where we were and where we should be.

16           MR. CHAIT: I think we'll brief damages at the  
17 appropriate time, but it seems that right now the Court is  
18 granting the motion in limine, so I don't -- unless I'm wrong  
19 about that, I don't think I need to argue that further.

20           And when we get to the stage of having to prove our  
21 damages --

22           THE COURT: No, no. Rather, I'm denying the motion  
23 in limine. That is, I'm not saying -- I'm -- I'm saying that  
24 it's not limited to the 16.

25           Now, how they figure out what the damages are, that's

1 another matter. If they think that 263 is relevant to their  
2 measure of damages, I don't know what their -- you know, I  
3 don't know the details of their theory of the measure of  
4 damages.

5 I would be happy to, even at a later date, to talk  
6 about that in more detail, just in the context of making sure  
7 that the damages phase goes efficiently. But that's something  
8 we should do, again, after Judge Hurley rules.

9 MR. CHAIT: I guess I'm a little confused.

10 I thought your Honor said that the calls, the other  
11 26-- 261 (sic) calls are not relevant. So when I made my  
12 comment about granting the motion, I meant --

13 THE COURT: They may -- they're not highly relevant.  
14 They're not relevant to the extent that they don't show that  
15 -- in my mind -- that the plaintiff is limited to 263.

16 They may be somewhat relevant from the perspective --  
17 and I don't want to prejudge what the plaintiff's measure of  
18 damages really is. I would leave it to them and you to think  
19 about what are the -- what did the 16 violations actually  
20 show? And what are the damages as a result of what was shown?  
21 How were -- how was the defense violating the injunction?

22 It's apparent to me that the defense wasn't just  
23 violating the injunction with the 16 specific instances.  
24 Rather, the 16 specific instances showed that it was a bigger  
25 problem than that. I'll leave it to you all to argue over



1 what that means. And the 263 might be relevant to that. I  
2 don't know. Or it might not be. It depends upon -- a lot of  
3 it depends upon what their valid theory of damages is.

4 I can think of a lot of different measures in talking  
5 about that. And I wouldn't want to limit either side's  
6 thinking by me saying this is what I would say. That's not my  
7 role here. Rather, it's to react to what you all give me.

8 And, so, I think you need to each do a lot of  
9 thinking about that. And I'm happy to reconvene after Judge  
10 Hurley -- I mean, this is all academic until Judge Hurley  
11 rules on it but, I think we ought to reconvene after Judge  
12 Hurley's ruling.

13 MR. McNew: Your Honor --

14 THE COURT: And I don't know -- because I don't even  
15 know what Judge Hurley's going to say in his ruling about what  
16 the 16 -- he may say what the 16 shows or what it doesn't  
17 show. I have no idea.

18 MR. CHAIT: I think that's certainly true. I think  
19 that the concern we have with allowing the calls into evidence  
20 is that, including *Howard Johnson's*, they haven't shown a case  
21 that allows them to prove additional liability -- first of  
22 all, we bifurcated for a reason.

23 They've proven no liability. They haven't proven any  
24 liability. The Court's already, as we talked about in the  
25 first part of this hearing, the Court's already expressed

1 considerable concerns and issues with what's wrong with  
2 relying on these calls to prove liability.

3 But it seems that at this point, you know, *Howard*  
4 *Johnson* involved one contemptuous act, being a franchise. And  
5 I think stands for the proposition that you get the damages  
6 flowing from that one act.

7 Here --

8 THE COURT: During the period of the violation.

9 MR. CHAIT: Right. But --

10 THE COURT: But --

11 MR. CHAIT: But that's an ongoing, singular violation  
12 of being a franchise.

13 Here, these are discrete acts that started and  
14 stopped usually within minutes of each other. Half an hour or  
15 whatever it winds up being.

16 THE COURT: And that's what I'm saying. They don't  
17 merely represent those discrete arguments. They show a  
18 violation over the period of time that the scheme -- I'll call  
19 it a scheme -- the scheme was in place.

20 MR. CHAIT: I think that in a Lanham Act case --  
21 which this is not -- that might work. But I still haven't  
22 seen a contempt case where the plaintiff or the moving party  
23 has been able to get damages based on a concept like that.

24 THE COURT: That's why I read from *Howard Johnson's*.  
25 *Howard Johnson's* stands for that proposition, in my mind.

1           It says "During the period that the defendants were  
2 diluting or using a color able imitation of the its trademark.  
3 That is, during the period they were in violation."

4           The 16 discrete instances shows that, over a period,  
5 the defense was in violation. That's what it shows to me.

6           MR. CHAIT: I think I understand now the Court's  
7 ruling. I think, respectfully, that the violation in *Howard*  
8 *Johnson* is of a different nature than the violation here.  
9 Because in *Howard Johnson* they were looking at a period of the  
10 violation, because it's the same violation.

11           Here, one violation doesn't mean another. It could  
12 have happened once, it could have happened more than once.  
13 they proved it happened 16 times --

14           THE COURT: I understand.

15           MR. CHAIT: -- but that doesn't mean --

16           THE COURT: I understand your point. It doesn't  
17 necessarily mean but, yes, I am concluding it does mean that  
18 16 is enough. That's what I'm concluding.

19           And, you know, I said that all along, from the very  
20 beginning. It's like they don't have to come in and -- it's  
21 like in any fraud case. You don't have to come in and say,  
22 you know, 200 examples of fraudulent behavior is enough to  
23 show a scheme to defraud. No, you don't have to do that.

24           You know, I opined early on that you really didn't  
25 have to show more than 10. They came in and showed 16. At a

1 certain point the scales are tipped towards showing, you know,  
2 these aren't 16 random isolated instances.

3 MR. CHAIT: I understand the Court's point.

4 THE COURT: And I understand your point, too. And,  
5 you know, you're welcome to make that argument.

6 MR. CHAIT: I have a question, actually.

7 THE COURT: Sure.

8 MR. CHAIT: So insofar -- well, not insofar.

9 The Court is denying the motion in limine. Are we --  
10 is that without prejudice, for us to still argue the  
11 inadmissibility of these calls?

12 THE COURT: Absolutely.

13 MR. CHAIT: Okay.

14 THE COURT: Absolutely. We can talk about that some  
15 more after Judge Hurley rules.

16 MR. CHAIT: Okay.

17 THE COURT: Because he may -- as long as we're -- who  
18 knows what he's going to do.

19 MR. CHAIT: Right. And I think it's important to us  
20 that we preserve the right to argue these calls are  
21 inadmissible because they don't meet any hearsay exception, as  
22 we've laid out in our motion. So as long as we're without  
23 prejudice to still make that argument, then that was my  
24 question.

25 THE COURT: And some of the thinking goes, as you

1 well know in that last equation on the hearsay part, some of  
2 that goes into the necessity of it. And, you know, I haven't  
3 thought through well enough the necessity of those 263 calls  
4 given what I've just articulated about what the 16 instances  
5 mean to me. And I want to see a well-formulated theory of  
6 damages before I decide whether or not the 263 is necessary.

7 MR. CHAIT: And it's on that basis that the Court's  
8 denying the motion.

9 THE COURT: Correct.

10 MR. CHAIT: Understood. Thank you, your Honor.

11 MR. SANDER: Judge, this is helpful. We have now, I  
12 believe, one supplemental brief that we have to give you on  
13 intent. Let me make this suggestion.

14 Rather than -- we treat the 17th as an outside date.  
15 I think I can probably get that out fairly quickly. And then,  
16 if they can file a response seven days after we serve -- I'll  
17 certainly have it to you no later than the 17, but --

18 THE COURT: That's fine. I mean, that was always my  
19 understanding, that theirs would be a week after you.

20 MR. SANDER: Okay. So if I can get it to it sooner,  
21 I certainly will.

22 THE COURT: Right.

23 MR. CHAIT: That was our understanding.

24 THE COURT: Yes. Anything else? Before we adjourn  
25 again?